

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 14 OF 2000

Shri Mohamed Ibrahim Khan,
son of Yakub Khan,
married, major in age,
President of Jamatul
Muslamin of Piligao,
Constitution of Muslim
Community of Piligao,
for self as also on behalf
of all other members of the
Association of the Muslim
Community of Piligao,
named and styled as
Jamatul Muslamin of Piligao.

... Appellant

versus

Shri Gajanan Rama Parab
Gaonkar, son of Rama Parab
Gaonkar, major, married,
resident of Gaonkarwada,
Village Piligao,
Bicholim Taluka, Goa.

... Respondent

Mr. V. K. Bodke, Advocate for the Appellant.

Mr. S. D. Lotlikar, Senior Advocate with Ms.K. Sambari,
Advocate for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 10TH MARCH, 2006.

JUDGMENT

This is plaintiff's second appeal arising from R.C.S. No.103/90. The dispute between the parties is regarding the removal of a stall/gada existing in survey no.213/11 of Piligao village in Bicholim Taluka in which the defendant carries on business in the name and style of "Brahmo Centre Store". This second appeal was admitted on 23-6-2000 on the following substantial questions of law:-

- (1) Whether the appellate Court, on the finding given by the trial Court that the plot on which the suit structure stands forms a part of Survey No. 213/11 could have reversed the finding of the trial Court and dismissed the suit?
- (2) Whether the suit could have been dismissed by the appellate Court on the ground that the plaintiff had no locus standi to maintain the suit?

2. To answer the said substantial questions of law a few facts are required to be set out. The plaintiff claiming to be an Association of the Muslim Community of Piligao and further claiming that the plaintiff is the

owner in enjoyment and possession of the property known as "Baisika Bhatalem" or "Pir Baisika Bhatalem" surveyed under Sub Divisions 11 and 12 of survey no.213 filed the suit, inter alia, for mandatory injunction for removing the stall/gada and for demolition of illegal construction. According to the plaintiff the suit property consists of a mosque, graveyard, shop premises and trees and that at the time of survey the name of their President Shri Ahmad Khan Hussain Khan was shown in the occupants' column of records of rights. The plaintiff claimed that about 40 years back a compound wall was constructed by the plaintiff towards the northern boundary of the said property by keeping a set back of about 2 metres between the edge of the public road and the compound wall so as to allow free movement of the people outside the compound wall and also to enable the plaintiff to wash the compound wall regularly. It was the case of the plaintiff that in the year 1972, at the request of the defendant, the plaintiff permitted the defendant to keep a movable wooden gada on the said vacant strip covering an area of 1.50 metres by 1.10 metres at the north west corner of the mosque by mere tolerance and as the plaintiff promised to vacate the same as and when asked to do so by the plaintiff. It was the case of the plaintiff that in June, 1986 the defendant was requested through the President of the plaintiff to vacate the said gada but the defendant instead of removing the said gada erected a roof of palm leaves

standing on wooden poles and extended its length by 1.50 metres and covered all the three sides with palm leaves unauthorisedly that the eaves water started falling over and inside the compound wall into the suit property and also started a club of carom games in the extended portion as a result of which there was noise throughout the day and late hours of the night which disturbed the peaceful atmosphere of the mosque and, therefore, the plaintiff sent their advocate's notice to quit, vacate and deliver peaceful possession of the land of the suit property upon which the said gada stood, and, the defendant in reply to the said notice alleged that the plaintiff had no right and interest in the said strip and, therefore, was not in peaceful possession of the land upon which the gada stood. The plaintiff stated that thereafter the defendant approached the plaintiff through its President and requested them to permit him to continue with the said gada for six months more and, therefore, the plaintiff did not initiate eviction proceedings against the defendant but inspite of the said promise the defendant avoided to take away the said gada on one pretext or the other. The plaintiff stated that on 23-6-1990 the defendant removed the wooden poles as well as the roofing of palm leaves and installed steel pipes with zinc sheets by encroaching further by 2 x 6 metres in such a manner that the edge of the said roofing of about 0.5 metres was directly leaning inside the compound wall of the property of the plaintiff and the

plaintiff immediately lodged a written complaint to the Village Panchayat and the Village Panchayat took no action. The plaintiff, therefore, filed the suit for permanent and mandatory injunction directing the defendant to remove the said stall/gada and demolish the illegally constructed structure, restoring its possession to the plaintiff.

3. The case of the defendant was that the said compound wall was constructed by the villagers of Muslim Community about 50 years back without keeping set back of 2 metres and that there was no strip of land between the edge of the road and the said compound wall either belonging to the plaintiff or to the Muslim Community. The defendant stated that the said compound wall was not constructed by the plaintiff and the land outside the compound wall did not belong to the plaintiff. According to the defendant the said gada/shop was constructed by him about 25 years back and was registered with the Village Panchayat in the year 1971 and since then he was paying tax of Rs.5/-. The defendant stated that he registered the said shop in the year 1975 under the Shops and Establishment Act and obtained a licence from the Director of Civil Supply to sell grocery items as well as kerosene and took electricity connections in the year 1971-1972 and it occupied an area of 5 x 2 metres. The defendant stated that the shop was not situated on the land of the plaintiff and, therefore, the plaintiff had no

right to ask the defendant to quit and vacate the said shop. The defendant stated that he carried out repairs to his shop on two occasions during the last 25 years and that the said zinc sheets for the roof and the iron pipes in place of wooden poles were put long time ago.

4. The learned trial Court by Judgment dated 22-1-1998 decreed the suit without costs but upon appeal being filed by the defendant, the learned Additional District Judge by Judgment dated 1-10-1999 allowed the appeal and reversed the decree of the learned trial Court and dismissed the suit. The learned trial Court had observed, and in my view rightly, that the documents produced by the defendant were not in respect of the suit stall/gada but of another establishment of the defendant and they did not disprove the case of the plaintiff that the defendant was given a licence to keep the gada in the suit property.

5. As regards question(1) it must be observed that the plaintiff had claimed to be the owner in possession of the suit property which according to the plaintiff was known as "Baisika Bhatalem" or "Pir Baisika Bhatalem" and surveyed under Sub Division Nos.11 and 12 of Survey No.213 of Piligao village. Except for denying the title of the plaintiff, the defendant did not set up any right or title to remain in the suit property.

Admittedly, the suit stall/gada was situated in Sub Division 11 of Survey No.213 i.e. the property in possession of the plaintiff. It is only in the course of evidence that the defendant came up with a plea that the suit gada was situated in public property but it is well settled proposition of law that no amount of proof in support of a plea not taken, can be looked into. On behalf of the plaintiff Mr. V. K. Bodke has submitted that the plaintiff had possessory title to the suit property on the basis of which the trial Court had decreed the suit but which possessory title has been ignored by the learned first appellate Court.

6. On the other hand, it has been submitted by Mr. S. D. Lotlikar, the learned Senior Counsel on behalf of the defendant that the plaintiff had produced no evidence that the property belonged to the association or to the Muslim Community and on that count the suit was rightly dismissed by the learned first appellate Court. It is further submitted that the survey record is not helpful to establish the title inasmuch as the plaintiff had led no evidence after the plaintiff had changed the suit into a suit filed in representative capacity on behalf of Muslim Community of Piligao.

7. On behalf of the plaintiff, Mr. Bodke has placed reliance

on a Division Bench Judgment of this Court in the case of **Mariumbi Aslamkhan and another v. Vithoba Yeshwanta and others** (AIR 1970 Bom 405). Reliance has also been placed in the case of **State of Gujarat v. Allauddin Babumiya Shaikh**(1991 Supp.(1) SCC 146) and in the case of **Harish Chandser and others v. Ghisa Ram and another** (AIR 1981 SC 695).

8. I am unable to accept the submissions of Mr. Lotlikar, the learned Senior Counsel. Undisputedly the suit stall/gada was in the property surveyed under no.213/11 which according to the plaintiff was a strip of land left by them outside the compound wall built by them about 40 years back and this fact was admitted by the defendant by stating that the said compound wall was built more than 50 years back by the villagers of Muslim Community of Piligao. There was no dispute that the suit property also consisted of a mosque, a graveyard, shop premises, etc. which were in possession of the plaintiff at least for over 40 years. The suit property was surveyed in the name of mosque(Mosque Devasthan) and one Shaikh Ali Shaikh Ibrahim in form nos.I and XIV of the survey records and the plaintiff through PW1/Shaiikh Abdul had explained in his evidence that the name of the plaintiff as well as its President was recorded in the said survey records. He had explained that in one of the forms nos. I and XIV(Exh.PW1/B) the

name of Ahmad Khan Hussain Khan was shown as President and in another the name of Shaikh Ali Shaikh Ibrahim was shown and that they had obtained affidavits from the said two persons that they had no right or interest in the property and had produced the affidavit of the said Ahmad Khan Hussain Khan at Exh.PW1/C. He had stated that the said Ahmad Khan Hussain Khan was the President at the time of promulgation of the survey records. The said forms nos.I and XIV(Exh.PW1/B) were more than sufficient to conclude that the suit property was in possession of the plaintiff by virtue of Section 105 of the Land Revenue Code, 1968. Plaintiff's evidence that they were in possession for over 40 years was not challenged by the defendant. The defendant has not set up any right either to keep the said stall/gada or to continue to keep the same in the property which was in possession of the plaintiff. Admittedly the plaintiff was in possession of the property which was surveyed under Sub Divisions 11 and 12 of Survey No.213 as their own and known as "Mosque Devasthan" or "Baisika Bhatalem" or "Pir Baisika Bhatalem". The plaintiff, therefore, had a possessory title in respect of the said land claimed by them against none set up by the defendant. Admittedly, the plaintiff has been in possession of the suit property for over 40 years. The strip outside the wall constructed by the plaintiff has been shown as part of the property of the plaintiff of which the plaintiff is in possession. That possession is 9 points of law, is a

common adage which is to the knowledge of everyone. It is well settled proposition of law, and it requires no support of any authority, that lawful possession is sufficient evidence of right as owner as against a person who has no title whatever and is a mere trespasser. In other words, peaceful settled possession is itself evidence of title in the absence of claim or proof of better title. Possessory title is nothing but a title derived from possession and which title is good against all except rightful owner, and as held by the Division Bench of this Court in the case of **Mariumbi Aslamkhan and another v. Vithoba Yeshwanta and others**(supra), such possessory title has all the features of an estate in land and like any other estate, it can be transferred inter vivos and can also be acquired by inheritance. Possession has a two-fold value; it is evidence of ownership, and is itself a foundation of a right to possession. The plaintiff having had possessory title was entitled to seek all reliefs against the defendant who had claimed no right or title against the plaintiff in respect of the suit property. A mere plea that the defendant was in possession of the stall of 25 years without anything more was not a plea which could defeat in any manner the possessory title claimed by the plaintiff. In my opinion, therefore, in the absence of any claim made by the defendant to occupy the property in possession of the plaintiff, the plaintiff on the basis of their possessory title were entitled to succeed in the suit. It was abundantly proved by the plaintiff through their

witnesses that in the year 1972 the defendant had a gada in the neighbouring property of one Professor Rebello who directed the defendant to remove the said gada and the defendant having approached the President of the plaintiff, the defendant was allowed to keep his gada on the land of the plaintiff, on condition that he would not disturb the peace of the plaintiff's Devasthan but thereafter the defendant extended the said gada and when in the year 1986 the plaintiff requested the defendant to remove the said gada instead of removing it, extended it further. It is obvious that the defendant had no right to continue with the said gada upon the property in possession of the plaintiff against the wishes of the plaintiff and, therefore, the plaintiff had necessarily to succeed in the suit and in my view, the learned trial Court had rightly decreed the suit of the plaintiff after the defendant's licence to remain with the said gada in the property of the plaintiff was revoked. The plaintiff was not at all required to lead evidence after the suit which was filed in the name of an association which was unregistered was converted into a suit filed in representation capacity on behalf of Muslim Community of Piligao. The suit was converted in that capacity because it could not be filed in the name of an association which had no legal entity. The evidence which the plaintiff had led earlier was not different from which it was required to be led by virtue of the said amendment. In any event the evidence led had to be appreciated in the

context of the change of suit in representative capacity and there was nothing in the said evidence which was led earlier which conflicted with the claim of the plaintiff, after the suit was filed in representative capacity. The plaintiff having proved their possessory title to the suit property and the defendant having set up no right of whatsoever nature to the suit property, the defendant had no right to remain on the suit property after his licence was terminated. The defendant therefore had to be evicted and this was rightly ordered by the trial Court. The answer to this question has got to be in the negative.

9. That takes us to question (2) and answer to this question has again to be in the negative. The suit was initially filed by Jamatul Muslamin of Piligao represented by its President Mr. Mohamad Ibrahim Khan. PW1/Shaiikh Abdul Shakul was the President at the time when he deposed before the trial Court. He had stated that when the suit was filed Mr. Mohamad Ibrahim Khan was the President. He had categorically stated, without any contest whatsoever from the defendant, that all the Muslim residents of Piligao were the members of the plaintiff. Though, PW1/Shaiikh Abdul Shakul had stated in his cross-examination that plaintiff's Society- Jamatul Muslamin was a registered Society during the time of Portuguese regime, he could not produce its registration certificate. Since he was

unable to produce the same and for that reason at the appellate stage the plaintiff changed the character of the suit filed by Jamatul Muslamin of Piligao as having been filed by Mohamad Ibrahim Khan as President of the said Jamatul for self and on behalf of the members of the association of the Muslim Community of Piligao. The learned first appellate Court observed that the learned trial Judge had fallen in error in holding that the plaintiff had locus standi to maintain the suit and in that she might have been right because at the relevant time when the suit was filed by Jamatul Muslamin of Piligao the said Jamatul was not a registered entity but after the suit was converted as one filed in representative capacity, in terms of O1, R8 C.P.C. the question of locus standi of the plaintiff did not survive at all. The learned Additional District Judge observed, and in my view rightly, that the amendment did not show any change of the suit in its tenor although there was a change in description. The change in name was carried out only because the Association namely Jamatul Muslamin was not registered as a legal entity. In spite of the change carried out by the plaintiff by converting the suit in representative capacity the learned Additional District Judge still proceeded to decide the same as if it had continued to be filed by the said association namely, Jamatul Muslamin which was not registered and the entire approach in concluding that the plaintiff could not maintain the suit as it was converted into, has been erroneous. The very object behind O1,R8

C.P.C. is to facilitate the decision of questions in which a large body of persons are interested without recourse to the ordinary procedure, where each individual may be required to maintain an action by a separate suit. The condition necessary for its application is that the persons on whose behalf the suit is brought must have the same interest, that is either the interest must be common or they must have a common grievance and the object is to facilitate the decision in which a large number of persons are interested. In the case at hand, the suit which was originally filed by the said association known as Jamatul Muslamin had to be converted into a suit filed in representative capacity on behalf of the Muslim Community of Piligao because the Jamatul was not a registered entity. There is no dispute that the mosque and the graveyard are being maintained by the Muslim Community as the whole of the village Piligao. There was certainly community of interest amongst the numerous persons who formed that community and for whose benefit the suit was filed and it was filed by the President of their unregistered association known as Jamatul Muslamin. It is to be presumed that the requirements of O1, R8, C.P.C. were complied with before a formal amendment was carried out to the plaint before the learned Additional District Judge. In my view, the suit filed by the President of Jamatul Muslamin on behalf of self and on other members of the Muslim Community of Piligao to protect their property which has a mosque,

graveyard, shop etc. for years altogether was certainly maintainable and it is the learned first appellate Court which fell into error in holding that the plaintiff had no locus standi to file a suit. At the costs of repetition, it may be stated that it is the President of the said Jamatul Muslamin who had filed the suit for self and other members of the Muslim Community which represents the Muslim Community of Piligao. In the light of the above, both the questions deserve to be answered in the negative. Consequently, the second appeal deserves to succeed and the Judgment of the learned first appellate Court is liable to be disturbed and that of the learned trial Court is to be maintained. Consequently, the suit of the plaintiff shall stand decreed with costs.

N. A. BRITTO, J.

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